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in the
Supreme Court
of the
United States

OCTOBER TERM, 1969

No. _____

MORTIMER NORMAN KORAN,

Petitioner

vs.

STATE OF FLORIDA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

Petitioner prays that a writ of certiorari issue to review the decision and judgment of the District Court of Appeal of Florida, Fourth District.

OPINION BELOW

The Opinion of the District Court of Appeal of Florida, Fourth District, affirming Petitioner's conviction, is reported in 219 So. 2nd 735, (Fla. App. 1968), and may be found in Appendix J.

GROUNDS FOR JURISDICTION

The Judgment of conviction of the Court of Record in and for Broward County, Florida was entered on November 3, 1967 (Appendix D), and the Sentence was entered on November 21, 1967. (Appendix G). The decision and Judgment of the District Court of Appeal of Florida, Fourth District, affirming Petitioner's conviction, was entered on February 14, 1969 (Appendix J), and said Court's Order Denying Petition For Rehearing was entered on March 21, 1969. (Appendix K). The Supreme Court of Florida denied a Petition For Writ Of Certiorari on June 9, 1969 (Appendix L), and further denied a Petition For Rehearing on July 11, 1969. (Appendix M).

The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3), because a title, right, privilege or immunity claimed under the Constitution of the United States was denied by the District Court of Appeal of Florida, Fourth District.

QUESTIONS PRESENTED

QUESTION ONE

THOUGH THE ELECTRONIC SURVEILLANCE OF PETITIONER OCCURRED PRIOR TO THE DECISION IN KATZ VS. UNITED STATES ON DECEMBER 18, 1967, DID THE INTRODUCTION INTO EVIDENCE OF TAPE RECORDINGS OF ORAL AND TELEPHONE CONVERSATIONS OF PETITIONER, WHEN PETITIONER ELECTED NOT TO TESTIFY AT HIS TRIAL, CONSTITUTE A VIOLATION OF HIS RIGHTS UNDER BOTH THE FOURTH AND FIFTH AMENDMENTS?

QUESTION TWO

DID THE ADMISSION INTO EVIDENCE OF THE FRUITS OF A WARRANTLESS SEARCH, NOT INCIDENTAL TO THE ARREST, BASED ON A CONSENT BY PETITIONER DURING CUSTODIAL INTERROGATION, WHEN PETITIONER WAS NOT ADVISED OF HIS RIGHT TO CONSULT WITH AN ATTORNEY PRIOR TO GIVING SUCH CONSENT, VIOLATE PETITIONER'S RIGHTS UNDER THE FOURTH AMENDMENT?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual

service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensations.

AMENDMENT XIV

SECTION I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF FLORIDA

SECTION 12—DOUBLE JEOPARDY:
SELF-INCRIMINATION:
EMINENT DOMAIN:
RIGHT TO WORK

No person shall be subject to be twice put in jeopardy for the same offense, nor compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall

private property be taken without just compensation. The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer.

SECTION 22—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches, shall not be violated and no warrants issued, but upon probable cause, supported by oath or affirmation, particularly describing the place or places to be searched and the person or persons, and thing or things to be seized.

TITLE 28

UNITED STATES CODE

SECTION 1257 (3)

Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: By Writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

In June, 1966, Petitioner was a printer engaged in the printing business in Hallandale, Broward County, Florida. A United States Secret Service Agent, Arthur Rivers, while conducting an investigation of counterfeit currency, devised a plan by which he would attempt to entice Petitioner into printing counterfeit currency and Florida drivers' licenses. Pursuant to Rivers' plan, an informer, one Richard Schatzabel, was equipped with an electronic eavesdropping device on his person, and was sent to Petitioner's place of business in Hallandale to discuss the above counterfeiting plan. Their conversation was overheard and recorded by Rivers, who stationed himself nearby but outside Petitioner's premises. (R. 19-22).

The next day, at Rivers' instructions, Schatzabel telephoned Petitioner at his place of business. The telephone used was equipped with an electronic eavesdropping device, and the conversation was overheard by Rivers and likewise recorded. (R. 30-33). Schatzabel arranged a meeting between Petitioner and Rivers, who acted in an undercover capacity as a buyer of counterfeit currency and drivers' licenses. Rivers, in his undercover capacity and also equipped with an electronic eavesdropping device on his person, met with Schatzabel and Petitioner under the Haulover bridge in Dade County, Florida, and two of their conversations were overheard and recorded by other law enforcement officers stationed nearby but out of view, who recorded same. (R. 23, 24, 77-78, 107-110).

During the next few days, Rivers initiated several telephone calls to Petitioner at his place of business, and Rivers' telephone was equipped with an electronic eavesdropping device. These telephone conversations were also recorded without Petitioner's knowledge or consent. A meeting was arranged during these telephone conversations for the delivery of counterfeit drivers' licenses from Petitioner to Rivers at the same Haulover bridge in Dade County, Florida. (R. 24-26).

At this meeting, the oral conversations between Rivers and Petitioner were again overheard and recorded by other police officers and agents. Petitioner was arrested at this meeting and charged by the Dade County authorities with "unlawful possession of counterfeit drivers' licenses". (R. 28-29, 79, 87, 116)

At the scene of the arrest, a power station in Dade County, Florida, a simulated arrest and detention was made upon Rivers. Petitioner was intensely interrogated in the power station by not only several other United States Secret Service Agents, who were in attendance, but also by a State of Florida Highway Patrolman and by a City of Miami Police Officer. During this intensive interrogation by the many law enforcement agents, Petitioner was asked if he had any objection to a search of his car, which was at the scene in Dade County, his home in Broward County, and his printing shop, which was several miles away in Hallandale, Broward County, Florida. The testimony of the agents indicated Petitioner was advised generally that he had the right to an attorney, but he was not specifically advised by any of the law enforcement officers that he had the right to consult an attorney prior to giving his consent to such a search. Under the

circumstances then existing, Petitioner stated he had no objection to the proposed warrantless search and signed what appeared to be a consent to said search. (R. 137, 164-165, 195-196)

All of the law enforcement officers at the scene and Petitioner then proceeded in several different cars from the power station in Dade County, Florida, to Hallandale in Broward County, Florida, and commenced a search of Petitioner's place of business. During such search, numerous sheets of paper and a "blanket" from Petitioner's offset printing press were seized, and were later identified by the prosecution's expert witness as the paper and "blanket" upon which the counterfeit drivers' licenses were printed. (R. 172, 211, 254). Petitioner was then charged by the Broward County officials with "making . . . counterfeit operators' or chauffeurs' licenses". (Appendix A).

Petitioner filed his Motion To Suppress, among other matters (1) the oral conversations between Schatzabel and Petitioner at Petitioner's place of business, (2) the oral conversations between Rivers, Schatzabel and Petitioner not at Petitioner's place of business and (3) the telephone conversations between Schatzabel and Rivers on the one hand, and Petitioner, which calls were made to, not from, Petitioner at his place of business, and (4) the physical evidence seized from Petitioner's place of business in Hallandale, Broward County, Florida as the result of the warrantless search. (Appendix B).

The Trial Court denied Petitioner's Motion To Suppress as to all matters, and at the Trial, testimony as to all oral and telephone conversations of Petitioner with

Schatzabel and Rivers were admitted into evidence, as well as tape recordings of all of such conversations, which were played to the jury over Petitioner's objections. (R. 102-103, 105-106). In addition, the physical evidence seized from Petitioner's place of business in Hallandale, Broward County, Florida were also introduced into evidence over Petitioner's objections. (R. 169, 209-210, 224-225, 245).

Petitioner did not testify at either the Motion To Suppress or at the Trial, nor was the informer, Schatzabel, produced as a witness by the prosecution at either the Hearing on the Motion To Suppress, or at the Trial.

Petitioner was found guilty by the jury and sentenced to a term of eight years in the state prison. (Appendix G). From this Judgment and Sentence, Petitioner filed his Notice of Appeal to the District Court of Appeal of Florida, Fourth District. (Appendix H)

As a result of the same electronic surveillance herein, Petitioner was charged by the United States authorities for various offenses related to counterfeit currency. Petitioner was tried and convicted in the United States District Court for the Southern District of Florida, and the identical tape recordings were admitted into evidence by the Trial Court. The United States Court of Appeals for the Fifth Circuit affirmed the conviction in **Koran vs. the United States of America,** 408 F. 2nd 1321, (5th Cir. 1969), (Appendix O), and a petition for a writ of certiorari was filed in the United States Supreme Court on May 23, 1969, and is now pending.

As a further result of the same electronic surveillance herein, Petitioner was charged, tried and convicted in the Criminal Court of Record in and for Dade County, Florida, and the identical tape recordings again were admitted into evidence by the Trial Court. The District Court of Appeal of Florida, Third District, affirmed the conviction in **Koran vs. State of Florida,** (Fla. App. 1968), 213 So. 2nd 735, (Appendix N), and a petition for a writ of certiorari also was filed in the United States Supreme Court on May 23, 1969, and is now pending.

Substantially, the same question as to the use of evidence secured by electronic eavesdropping is involved in all three cases.

HOW THE FEDERAL QUESTIONS WERE RAISED

Prior to trial, the federal questions were raised in Petitioner's Motion To Suppress such evidence which was obtained contrary to the Constitutions of the State of Florida and of the United States (Appendix B). The Trial Court denied the Motion To Suppress with regard to all evidence (Appendix C).

The federal questions were raised during trial when the Trial Court admitted into evidence testimony as to the oral and telephone conversations of Petitioner, which were overheard by electronic eavesdropping devices; and further admitted into evidence tape recordings of such conversations, and permitted them to be played to the jury, all over Petitioner's objections and renewal of his Motion To Suppress (R. 102-103, 105-106). In addition, the physical evidence seized from Petitioner's place of busi-

ness, as the result of a warrantless search, were also admitted into evidence, all over Petitioner's objections. (R. 169, 209-210, 224-225, 245).

The federal questions were raised after trial in Petitioner's Motion For New Trial (Appendix E), which was denied by the Trial Court (Appendix F).

The federal questions were raised in Petitioner's Assignments of Error filed in the District Court of Appeal, Fourth District (Appendix I), in the Brief of Appellant, and in the Petition For Rehearing in said Court, which was denied on March 21, 1969 (Appendix K).

The federal questions were likewise raised in the Petition for Writ of Certiorari, filed in the Supreme Court of Florida, which was denied on June 9, 1969, (Appendix L), as well as in the Petition For Rehearing in said Court, which was denied on July 11, 1969 (Appendix M).

REASONS FOR GRANTING THE WRIT

QUESTION ONE

There is now no question that the Government's electronic activities in the instant case were clearly violative of not only Petitioner's constitutional rights, but also of federal statutes. Petitioner's conviction undoubtedly would have been set aside under **Lee vs. State of Florida,** 392 U.S. 378, (1968), that such interception was in violation of Section 605 of the Federal Communication Act, but for the prospective application of such rule in **Fuller vs. State of Alaska,** 383 U.S. 80, (1969).

In addition, Petitioner's conviction also undoubtedly would have been set aside under the doctrine set forth in **Katz vs. United States,** 389 U.S. 347, (1967), that such electronic surveillance was in violation of rights under the Fourth Amendment, but for this Court's pronouncement in **Desist vs. United States**, 394 U.S. 244 (1969), that **Katz** also "should be accorded only prospective application."

Even though the electronic surveillance herein occurred prior to **Katz** on December 13, 1967, there are major factual differences between the present case and **Desist,** wherein the harsh and unjust rule of **Desist** should not be applicable, primarily because of the Fifth Amendment question.

Desist was not clear as to whether the defendants therein did or did not testify in their own behalf, other than this Court's pronouncement "an important part of the Government's evidence consisted of tape recordings of conversations among several of the Petitioners in a New York City hotel room." The lower Court, however, indicated that several of the defendants offered affirmative testimony and evidence, including an alibi, which may well have included direct testimony by the defendants.

Petitioner contends the Fifth Amendment demands a defendant should "not be compelled in any criminal case to be a witness against himself." To give full meaning to the rights created under such Amendment, the illegally seized tape recordings of oral and telephone conversations of Petitioner, which contained many incriminating statements by Petitioner, should not have been introduced into evidence and played to the jury, until and unless Peti-

tioner waived his constitutional right not to testify at the trial. Once Petitioner waived his constitutional right and did elect to testify, the tape recordings might then be admitted into evidence for the sole purpose of discrediting Petitioner.

If the above were not the rule, the Courts are merely giving lip service to a defendant's Fifth Amendment rights, in that the practical effect, as was the case here, would be to permit the jury to actually hear a defendant's own incriminating words, from his own mouth, convict him, when he has not yet had the opportunity to make a decision whether or not to waive his constitutional right against self incrimination. The prosecution obviously waives the defendant's rights for him.

Even prior to **Katz**, this Court was concerned with this problem. In **Berger vs. State of New York**, 388 U.S. 41, (1967), Justice Douglas, in his concurring opinion, stated at page 67:

> ". . . For the Fourth Amendment and Fifth come into play when the accused is 'the unwilling source of the evidence' . . . there being no difference 'whether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers . . .
>
> " . . . In short, I do not see how any electronic surveillance that collects evidence or provides leads to evidence, is or can be constitutional under the Fourth and Fifth Amendments . . ."

This Court has gone to great extreme to extend Constitutional rights of a defendant outside the courtroom by limiting the use of extrajudicial statements made by such defendant. **Miranda vs. State of Arizona,** 384 U.S. 436, (1966). Inside the courtroom, a defendant should receive the same protection of his constitutional rights.

Further, this Court in **Linkletter vs. Walker,** 381 U.S. 618, (1965), discussed the retrospective application of new criminal rules, and stated at Page 639:

> ". . . finally in each of the three areas in which we have applied our rule retrospectively, the principle that we applied went to the **fairness of the trial** . . ." (Emphasis Added)

But, in **Desist,** this Court stated the exclusionary rule under the Fourth Amendment is but a "procedural weapon that has no bearing on guilt" and "the fairness of the trial is not under attack."

Petitioner contends if a defendant elects not to testify, the prosecution has the burden of carrying forward the prosecution without the defendant's own voice and words making up the primary evidence for his conviction. It is respectfully submitted that the "fairness of the trial" is clearly under attack if such a procedure is used.

Since **Desist,** this Honorable Court has granted certiorari to the United States, **United States vs. White,** 394 U.S. 957, (1969), wherein the Seventh Circuit reversed a conviction under almost identical factual circumstances as here. Since the disposition of this case may be deferred until disposition of **White,** Petitioner would respectfully

comment on the government's prime contention there, which is also the prime contention here, that one party may consent to such electronic eavesdropping, and consequently, a defendant's constitutional right of privacy may be in fact waived by another.

Petitioner submits that if such were the holding of this Court, the development of the law with respect to **Miranda,** and finally **Katz,** would be of no practical meaning to a defendant. Petitioner contends only a defendant can waive his own constitutional rights.

QUESTION TWO

The facts are not in dispute that the search of Petitioner's place of business, several miles away from the place of arrest and in another county, was warrantless, but proceeded on a consent given by Petitioner. The facts are also not in dispute that Petitioner was given, during custodial interrogation, warnings as to his right to an attorney, but no one gave Petitioner a specific instruction that he was entitled to the advice of an attorney prior to consenting to a warrantless search.

If the prosecution now seeks to benefit from the warrantless search and introduce into evidence the fruits of that search, the prosecution must show by clear and positive testimony Petitioner voluntarily, knowingly and intelligently consented to such search, and that there was no duress or coercion, actual or implied. See **Judd vs. United States** 190 F. 2nd 649 (1951), wherein the Court stated at Page 651:

> "The burden on the Government is particularly heavy in cases where the individual is under arrest. Non-resistance to the orders or suggestions of the police is not infrequent in such a situation; true consent free of fear or pressure is not so readily to be found . . . In fact, the circumstances of the defendant's plight may be such as to make any claim of actual consent 'not in accordance with human experience' and explainable only on the basis of 'physical or moral compulsion'."

The philosophy of the **Judd** case was completely adopted by Florida in **Telavera vs. State of Florida,** 186 So. 2nd 11 (1966).

Judd was broadened in **United States vs. Blalock,** 255 F. Supp. 268, wherein the Court amplified "consent" at Page 269:

> "First, the consent must have been 'intelligent.' Obviously, the requirement of an 'intelligent' consent implies that the subject of the search must have been aware of his rights, for an intelligent consent can only embrace the waiver of a 'known right' . . . Certainly, one cannot intelligently surrender that which he does not know he has . . . The agents here properly warned defendant of his right to counsel and his right to remain silent, but they did not warn him of his right to refuse a warrantless search. The Fourth Amendment requires no less knowing a waiver than do the Fifth and Sixth . . ."

Since **Blalock,** many other Courts have had serious reflections upon the problems raised, mainly, whether or not the implications of **Miranda** suggest that the current law of consent and searches no longer satisfies this Honorable Court's intense concern for pretrial protection of privileges established by the Bill of Rights. Though **Miranda** involved waiver of Fifth and Sixth Amendment rights, it was founded upon the premise that no Constitutional rights should be relinquished in the absence of knowledge. The following cases have applied this doctrine to consent searches. **United States vs. Lewis,** 274 F. Supp. 184 (1967); **United States vs. Nikrasch,** 367 F. 2nd 740 (1966); **United States vs. Shrapshire,** 271 F. Supp. 521 (1967); **Rosenthall vs. Henderson,** 389 F. 2nd 514 (1969) and **United States vs. Moderacki,** (U.S.D.C. Del. 2), 2 Cr. L. 2403, (2/13/68).

Miranda presumes the existence of coercion whenever an individual being questioned has been "deprived of his freedom of action". **Blalock** reaffirms the value of knowledge and adds the specific requirements of a warning. Together **Miranda** and **Blalock** require, as a prerequisite to every consent and search, a waiving sufficient both to apprise an individual of his constitutional right to prevent a search, and to make him understand the consequences of waiving that privilege. The burden of education is upon the police and is not discharged by rendering advice as to the mere existence of constitutional rights.

An individual's waiver of these rights are only intelligent and knowledgable when he is made aware of the legal consequences of his decision, and it is obvious that the right to counsel is the most important included in the Miranda warning. See the leading article in the field, cited by many Courts, **67 Columbia Law Review 130,** Janu-

ary 1967-Consent Searches: A Reappraisal After Miranda vs. Arizona, wherein the writer states at page 155:

> "It is evident that right to counsel is itself the most important single right included in Miranda warnings. Indeed the role which counsel serves as repository of knowledge necessary to the making of intelligent decisions to waive an exercise of constitutional privileges is so fundamental that it might be argued that presence of counsel is an absolute prerequisite to any valid consent to search."

CONCLUSION

Petitioner respectfully submits that even without the application of **Katz** and **Desist**, pre-**Katz** law clearly recognized that the illegally obtained electronic eavesdropping evidence, used to convict Petitioner, constituted a violation of his constitutional rights under the Fourth, Fifth and Fourteenth Amendments, and that the illegally obtained physical evidence, obtained as the result of a warrantless search, also constituted a violation of his rights under the Fourth Amendment.

Respectfully submitted,

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By_____